

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 590 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

NAHARIYA BANDARIYA BHUNAK BOKADIA CHHOTAUDEPUR

Versus

STATE OF GUJARAT

Appearance:

MR KG SHETH for Petitioner

MR SR DIVETIA, APP, for Respondent No. 1

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

Date of decision: 24/03/98

ORAL JUDGEMENT

Appellant-original accused No.1 in Sessions Case No.36/90 is held guilty under section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and a fine of Rs.2,000/- in default R.I. for six months by the judgment and order dated 18th July,

1991 by the learned Additional Sessions Judge, Chhota-Udepur, District: Vadodara. The appellant has preferred this appeal against the said judgment and order.

Manjala Ghugharia, Namalia Dungaria and their deceased mother, Bai Chekali, were residing in village Bokadia, Taluka Chhota-Udepur, Vadodara. Accused No.1 is the real uncle of Manjala, PW 2. Accused No.2 is the son of accused No.1. They are also residing in that very village. According to the prosecution, mother of Manjala, Bai Chekali was blamed as witch as the villagers carried an impression that children in the village fell sick and died because of her curse. When PW 2, PW 5 and their mother Bai Chekali were sitting in their house after supper, all of a sudden accused came shouting "witch you want many persons". On hearing the same PW 2 came out of the house. He was followed by his mother Chekali. At that time, accused No.1 darted an arrow which struck Bai Chekali, who on being injured ran towards the house of her son-in-law Guman, which is at a distance of about 45 feet and fell either in the courtyard or on the threshold of the house of Guman. She herself drew out the arrow and died there. PW 2 and 5 followed her and went to the house of Guman, PW 6. Therefrom, PW 2 and PW 5 went to the house of Police Patel and he was informed. They then went to Rangpur Police station which is at a distance of about 10 k.m. where the complaint was registered. On complaint being lodged, offence was registered. Investigating Officer then came to village Bokadia, completed necessary formalities of investigation and submitted chargesheet against the accused in the court of Judicial Magistrate, first class, Chhota-Udepur, who in his turn committed the case against the accused to the Court of Sessions.

The learned Addl. Sessions Judge framed charge against accused No.1 under section 302 of the Indian Penal Code and against both the accused under section 302 read with section 114 of the IPC. The accused pleaded not guilty and claimed to be tried.

The prosecution led necessary evidence to prove the charge levelled against the accused. On completion of trial, the learned Addl. Sessions Judge held accused No.1 guilty of offence punishable under section 302 of the Indian Penal Code and ordered acquittal of accused No.2 and also of accused No.1 under section 302 read with section 114.

Learned advocate Mr K.G.Sheth has challenged this

order of conviction on the ground, namely, that though from the prosecution evidence it transpires that villagers were gathered at the scene of offence, no independent uninterested witness is examined. He wants to convey that the prosecution has only examined the interested witnesses and therefore in absence of any corroboration by independent evidence, it will be hazardous to accept their evidence and the learned Addl. Sessions Judge has erred in accepting the evidence of these witnesses. He further contended that the prosecution has failed to establish beyond reasonable doubt the identity of the accused as according to the prosecution, the incident took place, in any case, after 8.00 p.m. in the evening and it may be at 11 O' clock also in the night and admittedly it was a dark night. Mr Sheth contended that there was no visibility and the witnesses could not have seen and identified the person who darted the arrow. Mr Sheth contended that only on suspicion the names of the accused are given by the complainant. Mr Sheth further contended that the learned Addl. Sessions Judge erred in recording conviction even of accused No.1.

Mr Divetia, learned APP, very strenuously contended that the identity of the accused is established inasmuch as the witnesses belong to scheduled tribe and the accused are not only known to each other, but are ordinary residents of that village and are related to each other. Even in a dark night, acquainted persons in particular residing in that village and related to each other could easily be identified and therefore there is no doubt about the identity of the accused by PW 2, PW 5 and PW 6 in the instant case. Mr Divetia further contended that as the incident has taken place near the house of the complainant at night hours, it is not unusual or surprising that there are no other independent witnesses. When the incident takes place near the house at night hours witnesses available would be only the family members and the relations of the victim. Mr Divetia, therefore, contended that on this ground the evidence of these witnesses cannot be rejected and has rightly not been rejected by the learned Addl. Sessions Judge. Mr Divetia, therefore, contended that the appeal should be dismissed.

We will first refer to the evidence of Manjala, PW 2 who is the elder son of deceased Bai Chekali. PW 2 in his evidence states that "incident happened at 8 O' clock night. My mother and two brothers and I were at home. By that time Nahariya Bandariya came there and Bhavsinh Nahariya also came. Accused No.1 had bow and

arrow and accused No.2 had palia. Nahariya Bandariya darted arrow on my mother saying witch. The said arrow struck my mother on her belly portion just below her breast. My mother on being injured with the arrow fell down. Bhavsinh made an attempt to assault me with palia. I bent down. If I would have stood, my head would have been broken. They went away to their house. We went to the house of Patel". This witness has given a complaint Ex.13 where his version is that "yesterday night at about 9 O' clock, after supper, my two brothers, my mother and myself were at our house. At that time my uncle Nahariya came screaming to our house and by shouting he was telling witch you want many persons. On hearing so, I immediately came out of the house. My mother also came behind me out of the house. At that time, my uncle Nahariya was ready with arrow to shoot and his son Bhavsinh was standing with 'palia' in his hand. Feeling that my uncle Nahariya may strike arrow to me, I being afraid, just slipped out on the side of our house. By this time, my mother has come out of the house, she was struck with arrow. At that time my brothers were standing near the house. On my mother being injured with arrow, she ran away towards the house of my brother-in-law Guman and fell down. Then both the accused went away". In the cross examination, he had admitted that dead body of his mother was lying in the house of Guman. He has further deposed in the cross-examination that "my mother went towards the house of Guman and I remained in my house. Accused No.1 ran behind my mother. After running behind my mother, accused No.1 darted arrow". In the examination in chief, this witness has stated that his mother was injured near his house and had fallen down there. In the complaint he has stated that his mother ran towards the house of his brother-in law after she was injured by arrow near his house while in the cross examination he stated that the accused chased his mother who was running towards the house of Guman and then darted arrow. Thus in the evidence of this witness, there appears to be three versions as to the point of time place at which the arrow was darted. In the examination in chief, he stated that arrow was darted at his house and his mother was injured and fell down. In the cross-examination, he stated that his mother on seeing the accused ran towards the house of the brother-in-law, PW 6, and while she was running away, arrow was darted and she fell down near the house of PW 6. In the complaint, it is said that the arrow was darted near his house and his mother after having injured ran towards the house of his brother-in-law Guman and fell down near the house of Guman. Keeping this three varying factual statements, we will now see which of the

statement is a truthful one and relied upon and whether it is corroborated by other two eye-witnesses, namely PW 5 and PW6.

PW 5 is the younger brother of PW 2. In examination in chief, he stated that "incident took place at night. It was dark. Nahariya and Bhavsinh came to our house. Nahariya had bow and arrow and Bhavsinh had 'palia'. Therefore, my mother and my brother ran away towards the house of my brother-in-law, Guman. Nahariya darted arrow to my mother which struck on her breast portion above the belly. Both the accused then ran away. Arrow struck to my mother near the house of my brother-in-law. In the cross-examination this witness stated that "my mother died between 11.00 and 12.00 at night. We, therefore, shouted that 'injured by arrow, injured by arrow'. We therefore ran to the place and saw my mother was lying near the house of Guman". According to this witness, PW 5, he was in the house and he has seen the incident and according to him when the accused came to their house, his mother and brother (PW 2) ran away towards the house of Guman, PW 6. At that time arrow was darted which struck on her breast portion above belly. In our opinion, when PW 2 stated that the arrow struck at the belly portion and PW 5 stated that it struck on the breast portion, it could not make much difference. However, the fact remains that when PW 2 and deceased Bai Chekali were running towards the house of Guman, an arrow was darted. If arrow was darted to a running person and admittedly when the person was not running towards the person who is darting the arrow, the arrow will not in any circumstances injure the person on the front side. According to PW 5, PW 2 was also running with his mother. According to PW 2, his mother only ran towards the house of Guman. There is nothing in evidence of PW 2 and PW 5 that they have shouted on seeing the accused near their house. It is the accused who have shouted to call out PW 2 and his mother out of the house calling them witch. Therefore, when PW 5 says that his brother was running with his mother and when PW 2 says that on hearing shouts, he just hide himself by the side of his house, then whether he has seen his mother being injured by arrow darted and whether it was darted by accused No.1 becomes suspicious one. From the version of PW 2 and PW 5, it is clear that arrow was darted from behind. In the instant case, the injuries are in the front side of the chest. Keeping in mind the evidence of these two witnesses, it will be relevant to refer to the evidence of PW 6. PW 6 has stated that "on the day of incident I was at my house. My mother-in-law have come to my house. My mother-in-law came shouting that she was

assaulted. I came out of the house. My mother-in-law was darted arrow by Nahariya. She was injured on her breast. She herself took out the arrow and she fell down near my house. Nahariya after darting arrow ran away". According to this witness, Bhavsinh has also come there. He has further stated that Manjala and his mother were coming together. Manjala went inside the house. His mother-in law tried to save his son by turning round and at that time Nahariya shot arrow. According to this witness, PW 2 had accompanied his mother and they have reached near the house of Guman, this witness. According to this witness, PW 2 has entered his house and in order to save PW 2, when Bai Chekali turned round, she was shot with a arrow. This witness has improved his story before the Court. His story before the Police was that his mother-in-law came shouting. On hearing shouts, he came out of the house and Manjala went in his house and when his mother-in-law turned round, Nahariya shot the arrow. This part of the story which is said in the examination in chief was not the story before the Police. The question is, if accused No.1 chased by Chekali from her house in the direction of the house of Guman, PW 6 and shot arrow, how that arrow injured her on the front part of her body. An attempt is made by the prosecution to explain this by the evidence of Guman PW 6. But this is an improvement in the story of the prosecution and has been proved by the defence. In our opinion, thus the say of Guman on this point cannot be accepted. PW 6 in his further cross examination has stated that he was in his house and his house is near the house of the deceased. Arrow struck and there was shouts and he therefore came out of his house. Thus it is clear from the evidence of PW 6 that he has not seen the actual occurrence of the incident. At one point of time, he says that he saw the deceased and Manjala coming together and Manjala entering his house and arrow being shot to his mother-in-law when she tried to save Manjala. This was not the story put by him before the police. Therefore, the evidence of this witness does not inspire any confidence and the same cannot be accepted. In our opinion, the learned Addl. Sessions Judge has erred in accepting his evidence.

Then remains the evidence of PW 2 and PW 5. Variance in their evidence, in our opinion, makes their evidence doubtful to the effect that they have in fact seen the incident. In our opinion, they have not seen the actual commission of the incident and we have come to this conclusion from the following facts. On demise of Bai Chekali, autopsy was performed in public health centre Rangpur by Medical Officer, Dr. Kanjibhai, PW 8. He has found as many as 6 external injuries on the person

of deceased. He has also stated that the deceased must have died two hours after her last food. According to PW 2 the incident took place at about 8 O' clock in the night when they were sitting in their house after taking supper. In the complaint, it is stated that they have completed their supper by about 9 O' clock. If we read these statements with the say of Dr. PW 8, then the deceased has died by about 11.00 p.m. PW 2, PW 5 and PW 6 have said that the deceased has died immediately after arrow was shot. So if the deceased has died at about 11 O' clock night, in our opinion, it was more dark as admittedly it was a dark night. PW 2 in his evidence stated that the incident took place after 8 O' clock in the night. In the complaint he has stated that the incident took place after 9 O' clock. In the cross-examination, PW 5 has stated that on hearing shouts "injured by arrow, injured by arrow, they all ran to see and they found their mother lying near the house of Guman". This admission in the cross-examination of PW 5 suggests that he only came to know of the incident after his mother shouted and she was found near the house of Guman. Therefore, variance in the evidence of PW 2, PW 5 and PW 6 makes the evidence of these witnesses suspicious.

Apart from this, if the incident has taken place at about 9 O' clock as said by PW 2, then admittedly, the complaint was registered at 4.45 a.m. practically after about 7 hours. The complaint was registered in the Police Station which is at a distance of about 10 k.m. after 7 hours. In our opinion, in absence of any explanation by the prosecution for the same, it can be said to be a delayed one. But if the incident took place at about 11.00 or 12.00 at night, then it cannot be said to be a delayed one. However, it is not made clear by the evidence of PW 2 and PW 5 as to at what point of time the incident took place. From their evidence, it is doubtful whether they have seen the actual commission of incident. It is not clear from the evidence of any witness as to how they could identify the accused when admittedly it was a dark night. If by shouts of accused, PW 2 and deceased has come out of their house and according to PW 2 they tried to run away to save themselves, why was it necessary for them to come out of their house at such an odd hour of night when according to them the accused has shouted that "witch you want many persons". If these were the words spoken by accused No.1, they are suggestive that the person concerned has come there to do something wrong. If that be so, there was no reason for them to come out of their house. From the evidence on record, it appears that Bai Chekali was

found injured with arrow near the house of Guman, PW 6 and on his shouts other people gathered there. PW 2, PW 5 and PW 6 claiming to have seen the accused No.1 shoot arrow to Bai Chekali is a doubtful proposition and the benefit of doubt should go to the accused. The incident according to them took place at a dark night and it is doubtful whether the accused were identified or not. Accused and the prosecution witnesses belong to the community which normally have with them bow and arrow and when Bai Chekali was labelled as witch by the villagers, the probability of someone from village might have darted arrow and killed her cannot be ruled out.

In view of the above discussion, the learned Additional Sessions Judge has erred in accepting the doubtful evidence leading to no conclusion of certainty of arrow being shot by accused No.1. In our opinion, addition of accused No.2 who has not done anything also suggests that they have been named only on suspicion.

Mr Divetia contended that why PW 2 should have taken the name of accused when there is no enmity between them nor any reason for them to name them. The very fact that mother of PW 2 is known as witch itself is a cause or ground to name them. In view of the above fact, the learned Additional Sessions Judge has erred in accepting the evidence of the PW 2, 5 and 6 instead of giving benefit of doubt to the accused. The learned Addl. Sessions Judge ought to have given the benefit of doubt to accused more particularly on the question of identity of the accused.

In the result, the appeal is allowed. The order of conviction and sentence is set aside. Appellant accused is ordered to be set at liberty forthwith if not required in any other case. If fine is paid, the same be refunded.

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(vjn)